

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000071-001 DT

10/22/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

STATE OF ARIZONA

JASON C ADAMS

v.

TINA MAE JIMMIE CULLEENY (001)

GARY L THOMAS

CHANDLER CITY-MUNICIPAL
COURT
REMAND DESK-LCA-CCC

MINUTE ENTRY

CHANDLER MUNICIPAL COURT

Cit. No. #02P858747; 02P858749

Charge: 1) DUI-LIQUOR/DRUGS/VAPORS/COMBO
1) EXTREME DUI-BAC .15 OR MORE

DOB: 04/03/54

DOC: 03/02/01; 03/02/01

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This case has been under advisement without oral argument since its assignment on September 24, 2003. This decision is made within 60 days as required by Rule 9.9, Maricopa County Superior Court Local Rules of Practice(as amended, October 16, 2003). This Court has considered and reviewed the record of the proceedings from the Chandler Municipal Court, exhibits made of record, and the Memoranda submitted by counsel.

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Appellant was charged with Driving While the Influence of Intoxicating Liquor, a class 1 misdemeanor offense in violation of A.R.S. Section 28-1381(A)(1); and Extreme DUI, a class 1 misdemeanor in violation of A.R.S. Section 28-1382(A). Appellant entered pleas of Not Guilty and the case proceeded to trial on December 4, 2002. During cross-examination of Chandler Police Officer Thomas Chapman, Appellant's trial counsel attempted to elicit facts that Officer Chapman had conducted a Preliminary Breath Test (PBT) showing a blood alcohol content of .172. A blood test was later performed revealing Appellant's blood alcohol content to be .245. Appellant's counsel explained to the trial judge that he sought to introduce the PBT reading as a defense to the charge of Extreme DUI; that is, that Appellant's blood alcohol content was measured at an amount below .18.. The trial judge sustained Appellee's objection to such evidence and denied Appellant's trial counsel's request to admit any evidence of the PBT. Appellant claims the trial court erred in this regard and should have granted his motion for a new trial.

At the outset, this Court notes that there is no Arizona cases on point dealing with the issue of the admissibility of Preliminary Breath Tests. Appellee cites Valenzuela v. Cowan¹ for the proposition that PBT results are not admissible. However, Valenzuela involved an administrative review action from the Arizona Department of Transportation's implied consent revocation of Valenzuela's driver's license. In that decision, the Arizona Court of Appeals noted:

Therefore, even if the Preliminary Breath Test in this case had been admissible, which is questionable considering the lack of a waiting period or replicate testing, the officer could still require further tests (breath tests) under the statute (citation omitted).²

A PBT test would be admissible in Arizona's courts in the same manner that the results of any other test would be admissible. Breath tests may be admitted one of two ways: pursuant to A.R.S. Section 28-1323 et seq. ("the statutory method"); or pursuant to Rule 702, Arizona Rules of Evidence (the "Deason method").³ Clearly, the statutory method would not permit the results of a PBT to be admitted, because the PBT is not a device approved by the Department of Health Services, nor are the operators of a PBT issued a permit by the Department of Health Services to operate that device. The only remaining means by which a PBT test result could be admitted would be pursuant to Rule 702 of the Arizona Rules of Evidence. That rule provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,

¹ 179 Ariz. 286, 877 P.2d 1342 (App. 1994).

² Id. at 288, 877 P.2d at 1344.

³ See, State ex. rel. Collins v. Seidel (Deason, Real Party in Interest), 142 Ariz. 587, 691 P.2d 678 (1984).

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experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Utilizing Rule 702, a proponent of scientific evidence must demonstrate the reliability of the test or procedure and its general acceptance within a relevant scientific community, and that the results of the test are reliable because the test was properly performed, and the results were accurately measured and recorded.⁴

The record in this case reveals that Appellant's counsel (who was the proponent of the PBT test results) did not even attempt to establish a foundation under Rule 702 of the Arizona Rules of Evidence. The trial judge correctly informed counsel that there was insufficient foundation to let the results of the PBT in evidence.⁵ Nevertheless, counsel for Appellant argued that the PBT results should be admitted because of their relevance.⁶ The trial court responded:

I can understand why you would want to do it. The problem is that the only way that I will even consider admitting that (the PBT) would be if it were stipulation of the two parties....⁷

On appeal, Appellant argues in a similar fashion to the arguments presented to the trial court: that because the PBT results were relevant, exculpatory evidence, they should have been admitted. Appellant's counsel has completely ignored the foundational requirements for the admission of such scientific evidence. Relevance is simply not the issue. Without appropriate foundation, the trial judge correctly denied Appellant's request to introduce evidence of the Preliminary Breath Test results.

IT IS THEREFORE ORDERED affirming the judgments of guilt and sentences imposed by the Chandler Municipal Court.

IT IS FURTHER ORDERED remanding this matter back to the Chandler Municipal Court for all further and future proceedings in this case.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT

⁴ See, State ex. rel. Collins v. Superior Court (Silva, Real Party in Interest), 132 Ariz. 180, 644 P.2d 1266 (1982).

⁵ R.T. of December 4, 2002, at page 44.

⁶ Id. at pages 45-46.

⁷ Id. at page 46.